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No. 97783-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DOUG HERMANSON, an individual,

Respondent/Cross-Appellant,

vs.

MULTICARE HEALTH SYSTEM, INC., a Washington Corporation, d/b/a TACOMA GENERAL HOSPITAL, JANE and JOHN DOES 1 – 10 and their marital communities comprised thereof,

Petitioners /Cross-Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On behalf of
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the scope of discovery under the Civil Rules, and limits on discovery resulting from application of the attorney-client privilege, RCW 5.60.060(2), and the physician-patient privilege, RCW 5.60.060(4).

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents issues related to 1) a patient's interest in the confidentiality of information provided or acquired for medical treatment pursuant to the physician-patient privilege, and 2) the proper application of the attorney-client privilege. The facts are drawn from the Court of Appeals opinion and the parties' briefs. *See Hermanson v. MultiCare Health System, Inc.*, 10 Wn. App. 2d 343, 448 P.3d 153 (2019), *review granted,* 194 Wn.2d 1023 (2020) (Table); MultiCare Op. Br. at 5-11; Hermanson Resp. Br. at 9-14; MultiCare Reply Br. at 2-8; MultiCare Pet. for Rev. at 3-8; Hermanson Resp. to Pet. for Rev./Cross-Pet. for Rev. at 2-4; MultiCare Supp. Br. at 1-4.

Hermanson was involved in a single vehicle accident and was transported to Tacoma General Hospital for medical treatment. At the hospital, Hermanson received treatment from Trauma Trust employee/ER physician David Patterson, and MultiCare employee/nurses and a Multi-Care

employee/social worker. Hermanson was given a blood alcohol screen, and a health care provider allegedly disclosed Hermanson's blood alcohol level to law enforcement. Hermanson was charged with first-degree negligent driving and hit-and-run of an unattended vehicle.

MultiCare is a corporation that owns and operates Tacoma General Hospital. Together with a number of other Pierce County Medical entities, MultiCare formed Trauma Trust, to provide trauma services at several participating hospitals. Trauma Trust has its administrative offices at Tacoma General and Dr. Patterson has an office at Tacoma General. MultiCare also provides billing and technical support to Trauma Trust. MultiCare's contract with Tacoma Trust states:

> **Independent Contractor Status**. With regard to the subject matter of this agreement, each party is an independent contractor with respect to the others. Except as expressly provided in this agreement, no party is authorized or permitted to act or to claim to be acting as an agent or employee of any other party.…

Hermanson's Ans. to Pet. for Rev./Cross-Pet. for Rev. at 4.

Hermanson filed suit against MultiCare and Jane and John Does 1-10, identified as MultiCare employees, alleging negligence, defamation, false imprisonment and violation of the physician-patient privilege under RCW 5.60.060(4), arising out of the disclosure of his blood results after the accident. Hermanson did not allege medical malpractice and did not name either Trauma Trust or Dr. Patterson as defendants. Even though Trauma Trust and Dr. Patterson were not named, MultiCare, Trauma Trust and Dr. Patterson retained a single law firm.

MultiCare's counsel sought a protective order "confirming the right of MultiCare's attorneys to have ex parte privileged communications" with Dr. Patterson, the nurses and the social worker who had direct knowledge of the alleged negligent occurrence. The trial court ruled: 1) ex parte privileged communication with Dr. Patterson was not permitted because he was not MultiCare's employee; 2) ex parte privileged communication with the employee nurses was permitted; and 3) ex parte privileged communication with the employee social worker was prohibited because a social worker does not "fall under either the employee-physician or anything like a physician-patient analysis." *Hermanson*, 10 Wn. App. 2d at 351.

The Court of Appeals granted MultiCare's discretionary review. The court held: 1) MultiCare's counsel is prohibited from ex parte privileged communication with Dr. Patterson, because he was not MultiCare's employee; 2) ex parte privileged communication with the nurses and social worker is permitted, because they were MultiCare employees. MultiCare petitioned for review, and Hermanson cross-petitioned for review.

III. ISSUES PRESENTED

1) Whether the Court should extend the *Youngs* rule beyond corporate employees to include agents of the corporation within the corporate attorney-client privilege;

2) If so, does a corporate principal's admission of vicarious liability for the conduct of an independent contractor operate to create an agency relationship, such that it entitles corporate counsel to engage in ex parte privileged communications with the agent?

IV. SUMMARY OF ARGUMENT

This Court in *Loudon* adopted a bright-line rule prohibiting ex parte contact between defense counsel and nonparty treating physicians. The rule is grounded in public policy, in recognition of the risks to patient confidentiality and the patient-physician relationship inherent in allowing such contact.

In *Youngs*, the Court addressed the reach of the *Loudon* rule in a medical malpractice action, where the plaintiff's nonparty treating physician was an employee of the defendant. This Court balanced the principles supporting the plaintiff's physician-patient privilege and the defendant's attorney-client privilege, and fashioned a rule allowing defense counsel to engage in ex parte privileged communications with the defendant's employee physician if the communication meets the prerequisites to application of the attorney-client privilege, the physician has direct knowledge of the events giving rise to the litigation and the communications with the physician are limited to the facts of the alleged negligent incident.

The Court of Appeals held that *Youngs* is limited to employees and does not extend to independent contractors or agents of the corporation. The court's rule has the benefit of providing clear guidance regarding the scope of the privilege and is consistent with this Court's jurisprudence. This Court should similarly hold that the *Youngs* rule is limited to corporate employees.

If the Court concludes that agents may fall within the rule in *Youngs,* corporate defendants asserting their independent contractor qualifies as an agent and is encompassed by corporate attorney-client privilege should have

the burden of proving agency consistent with principles of agency law. In Washington, the essence of an agency relationship is the principal's retention of the right to control the manner of the agent's work. This control also undergirds the the attorney client privilege. Corporate defendants seeking ex parte access to their independent contractors should have the burden of establishing they have retained the right to control the manner of work. Any other rule would put the integrity of the physician-patient relationship in the hands of the corporate defendant and erode the protections in *Loudon.*

Prohibiting ex parte privileged contact in this context will not prevent corporate defendants and their attorneys' preparation of a defense, as they can access necessary information through traditional discovery.

V. ARGUMENT

Introduction:

In *Loudon v. Mhyre*, 110 Wn.2d 675, 677, 56 P.2d 138 (1988), this Court recognized the harms inflicted on a patient's interest in confidentiality of information provided for purposes of medical treatment. To protect the confidentiality of patient's medical information, the Court held that in a personal injury action, defense counsel is prohibited from engaging in ex parte contact with a plaintiff's physician as a matter of public policy.

Subsequently, in *Youngs v. Peacehealth,* 179 Wn.2d 645, 316 P.3d 1035 (2014), this Court addressed the problem raised when a physician is both the nonparty treating physician of the plaintiff and the employee of the defendant, and struck a balance between the physician-patient privilege and

corporate attorney-client privilege. Under this compromise, *Loudon's* "prophylactic protections" yield when a treating physician offering testimony based on direct knowledge of the events giving rise to the litigation is also an employee of the defendant. *See Youngs*, 179 Wn.2d at 665. The Court reasoned that its decision was necessary to "balance the values underlying the attorney-client privilege against those underlying the physician-patient privilege." *Id.* at 650.

Here, MultiCare urges the Court to further extend the corporate entity's rights, to now permit defendant's corporate counsel ex parte privileged contacts with plaintiff's treating physician employed by an independent contractor, who MultiCare calls its "admitted agent" for whom it is vicariously liable. MultiCare's proffered rule would presumably allow defendant medical facilities to selectively admit vicarious liability for the acts of their independent contractors and thereby obtain ex parte access to a plaintiff's treating physician. Such a rule would place the integrity of the physician-patient privilege in the hands of corporate health care providers and would tip the careful balance established in *Youngs*. The Court should resist the erosion of the physician-patient privilege by holding the line drawn in *Youngs* to balance the colliding privileges in this context.

A. Brief Overview Of The Physician-Patient Relationship And The Attorney-Client Privilege, And The Careful Balance Struck By This Court In *Youngs* When These Protections Collide.

1. The Physician-Patient Relationship and the *Loudon* Rule.

The physician-patient privilege prohibits a physician from testifying as to information provided by a patient or acquired for the purpose of medical treatment. *See Loudon*, 110 Wn.2d at 677-78. The privilege is personal to the patient and intended for the patient's benefit. *State v. Boehme*, 71 Wn.2d 621, 636, 430 P.2d 527 (1967). The privilege is set forth in RCW 5.60.060(4):

> [A] physician or surgeon… shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient…

(Brackets added.) The purpose of the privilege is twofold: (1) to "surround patient-physician communications with a 'cloak of confidentiality' to promote proper treatment by facilitating full disclosure of information" and (2) "to protect the patient from embarrassment or scandal which may result from revelation of intimate details of medical treatment." *Smith v. Orthopedics Int'l, Inc., P.S.*, 170 Wn.2d 659, 667, 244 P.3d 939 (2010) (citing *Carson v. Fine*, 123 Wn.2d 206, 213, 867 P.2d 610 (1994)).

In *Loudon,* the Court held that defense counsel is prohibited from engaging in ex parte contacts with a plaintiff's physicians "as a matter of public policy." 110 Wn.2d at 677. This Court has recognized the risks inherent in allowing such ex parte contacts: (1) violation of patient confidentiality through disclosure of irrelevant, privileged medical information, the harm from such disclosure which cannot be fully remedied by court sanction (*see Youngs*, 179 Wn.2d at 659; *Smith*, 170 Wn.2d at 666; *Loudon*, 110 Wn.2d at 678); (2) a chilling effect on the physician-patient fiduciary relationship that could hinder further treatment (*see Youngs*, 179

Wn.2d at 659-60; *Smith*, 170 Wn.2d at 667; *Loudon*, 110 Wn.2d at 679); (3) contravention of the physician's "interest in avoiding inadvertent wrongful disclosures" (*Loudon*, 110 Wn.2d at 680; *see also Youngs*, 179 Wn.2d at 660; *Smith*, 170 Wn.2d at 667); (4) undermining the treating physician's "role as a fact witness because during the process the physician would improperly assume a role akin to that of an expert witness for the defense" (*Smith*, 170 Wn.2d at 668); (5) giving defense counsel the opportunity to "shape and influence" a treating physician's testimony by providing selected information (*see Smith*, *id*.)[1]

The *Loudon* rule does not preclude defense counsel from accessing the plaintiff's treating physician, it simply requires that such access be provided through traditional discovery. The presence of plaintiff's counsel helps prevent the disclosure of "irrelevant, privileged medical information." *Loudon*, 110 Wn.2d at 678. "The plaintiff's interest in avoiding such disclosure can best be protected by allowing plaintiff's counsel an opportunity to participate in physician interviews and raise appropriate objections." *Youngs*, 179 Wn.2d at 659 (quoting *Loudon*, 110 Wn.2d at 678).

2. The Attorney-Client Relationship

The attorney-client privilege is codified in RCW 5.60.060(2)(a):

> An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to

[1] In *Smith*, the Court noted "Courts have recognized that, in the past, permitting 'ex parte contacts with an adversary's treating physician may have been a valuable tool in the arsenal of savvy counsel. The element of surprise could lead to case altering, if not case dispositive results.'" Smith, 170 Wn.2d at 669 n.2 (citing *Law v. Zuckerman*, 307 F. Supp. 2d 705, 711 (D. Md.2004) (citing *Ngo v. Standard Tools & Equip.*, *Co*., 197 F.R.D. 263 (D. Md. 2000)).

> him or her, or his or her advice given thereon in the course of professional employment.

The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Youngs*, 179 Wn.2d at 650 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L. Ed. 2d 584 (1981)).

The confidentiality created by the attorney client privilege is narrow, and must be strictly limited to its purposes:

> Because the privilege sometimes results in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; rather, it must be strictly limited to the purpose for which it exists.

Dietz v. Doe, 131 Wn.2d 835, 842-43, 935 P.2d 611 (1997) (citations omitted). The burden of proving the existence of an attorney-client relationship and that information comes within the privilege falls upon the proponent of the privilege. *See Newman v. Highland School Dist. No. 203*, 186 Wn.2d 769, 777, 381 P.3d 1188 (2016); *Dietz*, 131 Wn.2d at 844.

To be privileged, communications must have been made in confidence and in the context of an attorney-client relationship, i.e., communications between a client and an attorney. *See Newman*, 186 Wn.2d at 777; *Youngs*, 179 Wn.2d at 653 n.4, 664 n.8. The privilege extends to corporate clients, and the definition of "client" sometimes includes nonmanagerial employees. *See Newman*, 186 Wn.2d at 777-78 (citing

Youngs, 179 Wn.2d at 661; *Upjohn*, 449 U.S. at 394-95). In determining whether the privilege extends to a particular corporate employee, the issue for the Court is whether the employee qualifies as a "client." *See Youngs*, 179 Wn.2d at 653 & n.4; *cf. Newman*, 186 Wn.2d at 779-80.

3. The conflict that arises in a medical malpractice action when a plaintiff's treating physician is also an employee of the corporate defendant, and the delicate balance struck by this Court in *Youngs*.

In *Youngs*, a medical malpractice action, the Court was asked to resolve the conflict that is created when corporate defense counsel seeks ex parte access to an employee who is also the plaintiff's nonparty treating physician. In the context of determining whether the defendant's attorney's communications with the defendant's employee came within the defendant's attorney-client privilege, the Court balanced that privilege against the plaintiff's physician-patient privilege. *See id*. at 665. Adopting a "modified version" of the test announced in *Upjohn*, this Court held that corporate defense counsel may engage in privileged ex parte contact with the defendant's employee who is also the plaintiff's nonparty treating physician only if the communication meets the requirements of the attorney-client privilege, the physician has direct knowledge of the events giving rise to the litigation, and the communications with the physician concern the facts of the alleged negligent incident. *See Youngs*, 179 Wn.2d at 653.

B. This Court Should Decline To Extend The *Youngs* Rule To Independent Contractors That Corporate Health Care Providers Label Their "Admitted Agents" Because Such An Extension Would Undermine The Balance This Court Struck In *Youngs* And Would Erode The Physician-Patient Privilege.

In *Hermanson*, MultiCare seeks to expand the definition of "client" in the attorney-client privilege to include its independent contractor, Dr. Patterson, on the basis that he is MultiCare's "admitted agent." *See* MultiCare Op. Br. at 6; MultiCare Pet. for Rev. at 15. The Court of Appeals below seemed to accept MultiCare's suggestion that it could "admit" agency in this context, assuming agency in its opinion, but nonetheless denying MultiCare the privilege it sought because "Hermanson's physician-patient privilege is not outweighed by the fact that Dr. Patterson is MultiCare's admitted agent." *Hermanson*, 10 Wn. App.2d at 359.

As presented here, MultiCare's argument raises two questions: 1) whether the Court should extend the *Youngs* rule beyond corporate employees to include independent contractors of the corporation; 2) if so, does MultiCare's "admission" operate to create the requisite relationship necessary to invoke the privilege.

1. The Court of Appeals correctly held that independent contractors fall outside the reach of *Youngs,* and this Court should concur and adopt a bright line rule limiting *Youngs* to corporate employees.

MultiCare's primary argument to justify extending its attorney-client privilege to include ex parte privileged communications with Hermanson's treating physician is that he is MultiCare's "admitted agent," and Hermanson seeks to hold MultiCare vicariously liable for the conduct of the treating physician. The rule it advances is broad: "[T]his Court should make clear the *Loudon* ex parte contact prohibition does not apply to prevent such ex

parte communications about the alleged negligent event with those treating physicians (whether current or former employees, agents, or ostensible agents) for whose conduct the plaintiff seeks to hold a corporate health care provider defendant vicariously liable." *See* MultiCare Supp. Br. at 9 (brackets added). Citing cases outside Washington, it claims any other rule would "effectively prevent the corporate health care provider defendant from defending itself against a plaintiff's vicarious liability claims by barring its counsel from communicating with the physicians for whose conduct it is allegedly liable." MultiCare Supp. Br. at 9.[2]

In *Newman*, this Court rejected the argument that corporate attorney-client privilege must necessarily encompass employees for whom the corporation may be vicariously liable. There, the defendant school district argued for an extension of the attorney-client privilege to communications

[2] MultiCare cites several cases from other jurisdictions for the proposition that a defendant hospital may have ex parte communications with a plaintiff's nonparty treating physician where the plaintiff seeks to hold the hospital vicariously liable for the conduct of the treating physician. *See* MultiCare's Supp. Br. at 7-12. None of those cases address whether a defendant hospital may have ex parte privileged communications with a plaintiff's treating physician who is employed by an independent contractor in the absence of a statute or court rule permitting such communications. *See Public Health Trust v. Franklin*, 693 So.2d 1043 (Fla. App. 1997) (interpreting statutory exception to patient confidentiality "when a health care provider is or reasonably expects to be named as a defendant" to apply to treating physicians, where the employment status of treating physicians is unclear, described only as "agent or employee" of defendant hospital); *White v. Behlke*, 2004 WL 1570095, 65 Pa. D. & C.4th 479, 486 (allowing ex parte communications of treating physicians pursuant to a court rule providing exceptions for obtaining information from defense counsel's client and the client's actual or ostensible employees); *Morgan v. County of Cook*, 625 N.E.2d 136, 139 (Ill. App. 1993) ("when a patient seeks to hold a hospital vicariously liable for the conduct of a physician-employee, the hospital is entitled to speak ex parte with that physician"); *Wilson v. IHC Hospitals, Inc*., 289 P.3d 369, 397 (Utah 2012) ("IHC met ex parte with two categories of treating physicians, those it did not employ and those it did. IHC's ex parte meetings with Dr. Boyer, whom IHC did not employ, were improper. However, its ex parte meetings with the Employed Physicians were permissible to the extent that the Wilsons placed the conduct of the Employed Physicians at issue under a theory of vicarious liability").

with former employees on the basis that the "former employees may possess vital information about the matters in litigation, and that their conduct while employed may expose the corporation to vicarious liability." *Newman*, 186 Wn.2d at 781. The Court declined to extend the privilege:

> These concerns are not unimportant, but they do not justify expanding the attorney-client privilege beyond its purpose. The underlying purpose of the corporate attorney-client privilege is to foster full and frank communications between counsel and the client (i.e., the corporation), not its former employees.

Id.

The Court noted that in *Youngs* and *Upjohn* it relied on the values underlying the attorney-client privilege "to recognize that corporate litigants have the right to engage in confidential fact-finding to communicate directions to employees whose conduct may embroil the corporation in disputes." *Newman*, 186 Wn.2d at 779 (citing *Youngs*, 179 Wn.2d at 651-52). However, it noted the approach in *Upjohn* "presupposed attorney-client communications taking place within the corporate employment relationship," and declined "to expand the privilege to communications outside the employer-employee relationship." *Id.,* 186 Wn.2d at 779-80.

MultiCare urges the Court to adopt the approach of *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994) and *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010), which it characterizes as "extend[ing] the corporate attorney-client privilege to an agent of the corporation who in relevant respects is the 'functional equivalent of an employee.'" MultiCare Supp. Br. at 14 (brackets

added). The appellate court properly declined to apply the reasoning from *Bieter* and *Graf* here.

First, *Bieter* applied a broader conception of corporate privilege than what is generally applied in Washington. The starting point for the analysis in *Bieter* was Supreme Court Standard 503(b), a proposed Federal Rule of Evidence, which included within the scope of the privilege communications "between [the client] or his representative and his lawyer or his lawyer's representative." *Bieter*, 16 F.3d at 935 (citing Supreme Court Standard 503(b)). While ultimately not adopted, the rule was relied upon by *Bieter* in defining the proper scope of the federal attorney client privilege. The court framed the issue as whether communications between counsel and the client's contractor "necessarily fall outside the scope of the attorney-client privilege because the consultant was neither the client nor an employee of a client." *Id.*, 16 F.3d at 934. The court held the contractor there qualified as a "representative" under the rule. *Id.,* 16 F.3d at 938; *see also Graf*, 610 F.2d at 1158-59 (applying the rule announced in *Bieter*)

Broadening the privilege to "representatives" would appear inconsistent with the conception of the privilege in Washington, which generally focuses on communications between the attorney and the *client*. *See* RCW 5.60.060(2)(a) (providing that "[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her" (brackets added)). This Court's analysis of privilege in the corporate context has been narrowly

drawn, to focus on communications between the attorney and her *client. See, e.g., Newman,* 186 Wn.2d at 777 (attorney-client privilege "is a narrow privilege and protects only communications and advice between attorney and client" (citing *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004)); *Lowy v. PeaceHealth,* 174 Wn.2d 769, 785-86, 280 P.2d 1078) (2012) (privilege is narrow, such that "observations by the lawyer that might be made by anyone, and which involve no communicative intent by the client, are not protected"). Expanding the privilege to non-clients would run afoul of Washington's narrow conception of this privilege.

Moreover, even were this Court inclined to broaden Washington law regarding privilege to encompass "representatives," this case would provide no basis for such an expansion. *Bieter* rested on a showing that the representative's relationship with the corporation was "varied and extensive," and included securing clients on the company's behalf, extensive management responsibilities, working with consultants, and appearing at public hearings on the company's behalf. In *Graf,* the Ninth Circuit extended the privilege to a consultant who regularly communicated with brokers for the benefit of the corporation, marketed its products, managed its employees, and acted as a spokesperson on its behalf. *See Graf*, 610 F.3d 1148.

Here, MultiCare argued in the Court of Appeals that Dr. Patterson has a significant relationship to MultiCare based on the relationship between MultiCare and Trauma Trust. *See* MultiCare Op. Br. at 29-30. But this does not speak to the considerations in *Bieter* and *Graf,* which focused on the

representative's relationship with the corporation. In this Court, MultiCare makes little attempt to demonstrate a significant relationship between MultiCare and Dr. Patterson, instead resting on its "admission" of agency. *See* MultiCare Supp. Br. at 14. MultiCare's attempt to sidestep the showings required in *Bieter* and *Graf* by its "admission" of agency should be rejected.

This Court has recognized the value of preserving a predictable framework for application of the attorney-client privilege. *Id*. at 782 (citing *Upjohn*, 449 U.S. at 393). Its precedent supports limiting the *Youngs* rule to current employees. The Court should decline to expand the reach of that rule.

2. If the Court concludes that *Youngs* applies to corporate agents as well as employees, the Court should hold that a corporate defendant asserting the privilege has the burden of proving that it has retained the right to control the manner of the physician's work.

In this case, MultiCare urges the Court to adopt a rule providing that if the plaintiff's nonparty treating physician is an "admitted agent" of the defendant hospital and has direct knowledge of the events giving rise to litigation, the privilege should attach. It asserts that Dr. Patterson "was acting as an employee, agent, or ostensible agent of the corporation." MultiCare Supp. Br. at 12. MultiCare does not attempt to support this assertion, instead relying on its "admission" of agency. No finding was made below regarding MultiCare's control over Patterson, and the contract between MultiCare and Patterson's employer provides that there is no agency relationship.[3] On

[3] MultiCare asserted in the Court of Appeals that it has a sufficiently "significant relationship" as described in *Adamski v. Tacoma Gen. Hosp.*, 20 Wn. App. 98, 108, 579 P.2d 970 (1978) to establish agency in this context. *See* MultiCare Op. Br. at 26-30. In *Adcox v. Children's Orthopedic Hosp. and Medical Center,* 123 Wn.2d 15, 37, 864 P.2d 921

deeper inspection, it appears that MultiCare's argument rests not on an admission of agency, but rather on an admission of vicarious liability.

While MultiCare may voluntarily assume liability for the acts of its independent contractor, agency is an issue of legal status drawn from the facts of the particular case. An agency relationship exists "when one party acts at the instance of and, in some material degree, under the direction and control of another." *CKP, Inc. v. GRS Construction Co.*, 63 Wn. App. 601, 607, 821 P.2d 63 (1991). And, while a party can admit an adverse fact, here MultiCare seeks to "admit" agency to obtain the *benefit* of the attorney client privilege. But MultiCare's efforts to obtain privilege through such an admission ignores that a finding of agency necessitates a finding of *control* that is a foundational principle on which both agency and privilege are based.

Generally, independent contractors are presumed not to be under the control of their principals. *See Wilcox v. Basehore*, 187 Wn.2d 772, 786–87, 389 P.3d 531 (2017). A finding of agency signifies that the parties have

(1993), the Court described *Adamski* as "holding that a hospital is responsible for acts of medical personnel at its facility if either traditional agency principles (consent and control) are met or if under the theory of 'ostensible agency' the hospital holds out the personnel as employees." Ostensible, or apparent, agency, results in vicarious liability where a principal's objective manifestations lead a third person to believe a wrongdoer is the agent of the principal. *See Mohr v. Grantham*, 172 Wn.2d 844, 860, 262 P.3d 490 (2011). Apparent agency does not depend upon the existence of an actual agency relationship between the principal and the ostensible agent. *See Wilson v. Grant*, 162 Wn. App. 731, 744, 258 P.3d 689 (2011); *see also Mohr*, 172 Wn.2d at 862. Vicarious liability, in itself, is not sufficient to show the agency requisite to establish an attorney-client privilege between the principal's attorney and the purported agent. *See Newman*, 186 Wn.2d at 781. Actual agency, if not employee status, should be required to establish an attorney-client relationship between the principal's attorney and the person for whose communications the attorney-client privilege is claimed to apply. Apparent, or ostensible, agency by itself is insufficient. Here, MultiCare made no showing of consent and control or actual agency; Dr. Patterson was employed by an independent contractor whose contract with MultiCare provided "no party is authorized or permitted to act or claim to be acting as an agent or employee of any other party."

consented to a relationship pursuant to which the principal retains the right to control the manner of the agent's work. An agency relationship "arises from manifestations that one party consents that another shall act on his behalf and subject to his control, and corresponding manifestations of consent by another party to act on behalf of and subject to the control of the other." *Stansfield v. Douglas County,* 107 Wn. App. 1, 18, 27 P.3d 205 (2001) (quoting *Restatement (Second) of Agency* § 1 (1958)). The "crucial factor" is the right of control over the manner of the alleged agent's work. *O'Brien v. Hafer,* 122 Wn. App. 279, 283, 93 P.3d 930 (2004).

Ordinarily, a party seeking to establish agency must prove the requisite control that is the essence of the agency relationship. *See Matsumura v. Eilert,* 74 Wn.2d 362, 363, 444 P.2d 806 (1968) ("[b]efore the sins of an agent can be visited upon his principal, the agency must be first established" (brackets added)). Whether the necessary control is present to establish a principal-agent relationship is generally a question of fact. *See FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 175 Wn. App. 840, 877, 309 P.3d 555 (2013).

MultiCare seeks to sidestep this factual analysis here by admitting liability (and apparently agency) for Dr. Patterson's conduct. To determine whether MultiCare's admission of liability should satisfy the "client" component of attorney-client privilege, it is necessary to examine the reasons agency matters in the context of corporate attorney-client privilege. Liability exposure – the aspect of agency on which MultiCare appears to hang its hat

– is admittedly part of the basis for recognizing the corporate privilege. However, equally relevant is the presence of control over company employees to whom the privilege is extended. An agent owes a duty to provide information to her principal within the context of the agency relationship. *See Restatement (Third) of Agency* § 8.11 (2006). This duty to provide information both presupposes and facilitates the principal's control:

> An agent also owes the principal a duty, subject to any manifestation by the principal, to provide information to the principal that is material to the agent's duties to the principal. The principal may direct that information be furnished to another agent or another person designated by the principal. . . . An agent's duty to provide information to the principal facilitates the principal's exercise of control over the agent. Within an agency relationship, an agent assents to act subject to the principal's control. . .

Restatement (Third) of Agency § 8.11 cmt. b (2006); *see also Newman,* 186 Wn.2d at 780 (citing § 8.11 and recognizing "[a]n organizational client . . . can require its employees to disclose facts material to their duties . . . to its counsel for investigatory or litigation purposes" (brackets added)).

The concept of control has been central to the analysis regarding the purposes of the corporate attorney-client privilege. In *Upjohn*, the corporation faced potential liability and key information related to its liability exposure was held by nonmanagerial corporate employees. The court noted that employees provided relevant information regarding potential illegal activity to corporate counsel "at the direction of corporate superiors." 449 U.S. at 394. In finding the privilege would sometimes be extended to nonmanagerial corporate employees, the Court identified specific factors relevant to its decision. Those factors included (1) the

communications were made at the direction of corporate superiors, and (2) the communications were made by corporate employees. *See Upjohn*, 449 U.S. at 394; *see also Youngs*, 179 Wn.2d at 663-64 n.7 (citing the reasoning in *Upjohn*); *Newman,* 186 Wn.2d at 780 (similar).

Here, MultiCare has shown no evidence of control over Dr. Patterson sufficient to create the type of relationship necessary to argue for the application of MultiCare's attorney-client privilege to its attorneys' communications with Patterson. An admission of vicarious liability provides no evidence of control, and does not substitute to demonstrate the corporate relationship required to invoke the attorney-client privilege.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief and resolve this appeal accordingly.

DATED this 27th day of April, 2020.

DANIEL E. HUNTINGTON for VALERIE D. MCOMIE

On behalf of
Washington State Association for Justice Foundation

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2020, I electronically filed with the Clerk of the Court using the Washington State Appellate Courts Portal and also served via email the foregoing document to the following:

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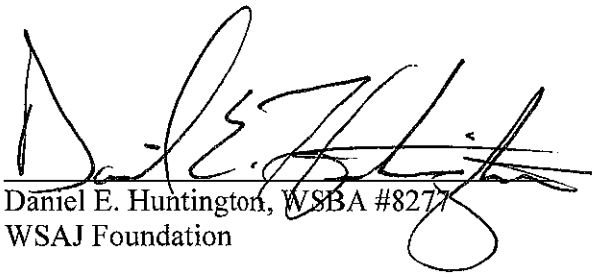

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